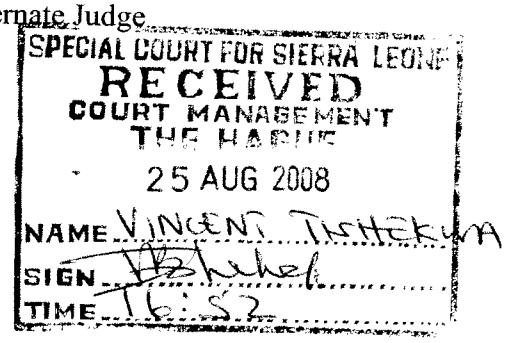
S68) SCSL-03-01-T (18370-18382) 18370

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Teresa Doherty, Presiding
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Mr. Herman von Hebel

Date filed: 25 August 2008



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION REGARDING THE TENDER OF DOCUMENTS

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Leigh Lawrie

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("**Rules**"), the Prosecution hereby applies for leave to appeal the Trial Chamber's oral ruling of 21 August 2008 regarding the tender of documents in the current proceedings ("**Decision**").[1] The Chamber did not indicate that written reasons for the Decision would follow. Therefore, the Prosecution files this application on the basis of the oral ruling.

2. The Prosecution seeks leave to appeal the Decision as the Trial Chamber erred in law by ruling that it was impermissible for the Prosecution to move into evidence from the bar table under Rule 89(C) a document that was relevant on its face to issues in the case and to the testimony of the witness then testifying. This error gives rise to exceptional circumstances and irreparable prejudice, thus satisfying the standard specified in Rule 73(B) for leave to appeal to be granted.

3. The document which was the subject of the Decision and indeed the two other documents which the Prosecution was not permitted to show witness TF1-367 during proceedings on 20 August 2008 are not documents which would be excluded by the restrictions contained in Rule 92*bis*. However, notwithstanding this fact, the Prosecution seeks leave to appeal this issue at this time in order to ensure that it is not foreclosed from seeking the admission of documents under Rule 89(C) in instances where it would be prevented from seeking admission under Rule 92*bis*.

II. BACKGROUND

4. During court proceedings on 21 August 2008, the Prosecution sought to refer witness TF1-367 to a document.[2] Before the document could be shown to the witness, Defence Counsel requested "some foundation as to the basis upon which [the] particular document [was] being placed before the witness."[3] Defence Counsel then specifically identified two questions he wished answered: "One, is the witness in a position to speak to [the] document. Secondly, what is the foundation for placing [the] particular document before

[1] *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 21 August 2008 ("**Transcript**"), page 14253, lines 1-6.
[2] Transcript, page 14245, lines 8-10.
[3] Transcript, page 14245, lines 11-13.

[the] witness?"[4]

5. In response, Prosecution Counsel stated that he no longer wished to place the document before the witness but, instead, wished to move it into evidence as a relevant document under Rule 89(C).[5] Regarding relevance, Prosecution Counsel identified the document to be RUF mining records prepared after witness TF1-367 was a mining commander, that the locations mentioned therein were locations directly tied to the witness' testimony and that the commanders named therein were commanders who the witness had identified in his testimony as being involved in mining.[6] Therefore, while it was submitted that the document was *prima facie* relevant to the current proceedings in and of itself, the document was also immediately relevant when considered in the context of the testimony of witness TF1-367.

6. In response, Defence Counsel noted the width of Rule 89(C) but stated that "one or two *a priori* conditions [had] not been met. Where did [the document] come from? Who wrote the document? Where is the original? Is it available for inspection?"[7] Defence Counsel then observed that "If none of those one would have thought necessary conditions are met, effectively what my learned friend is arguing for is a position whereby the OTP could download any document from the internet and present it to this tribunal through any witness and in our submission Rule 89 cannot be that wide."[8]

7. In reply, Prosecution Counsel noted that none of the preconditions identified by Defence Counsel were required for the admission of a document under Rule 89(C)[9] and that the authenticity of the document is a matter of weight not of admissibility.[10]

8. Following the exchange regarding the requirements of Rule 89(C), Justice Lussick observed that: "If the document cannot be linked to the evidence of the witness, then you are not seeking to prove any facts by oral evidence. You are seeking to prove them by documentary evidence. And it seems to me that if that is so the conditions of Rule 92*bis*

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[4] Transcript, page 14245, lines 19-22.
[5] Transcript, page 14245, lines 24-26.
[6] Transcript, pages 14245, line 27 to page 14246, line 5.
[7] Transcript, page 14246, line 28 to page 14247, line 1. It should be noted that the original was being used and had been available for inspection but the Defence had not requested to inspect the document.
[8] Transcript, page 14247, lines 2-6. It should also be noted that there is no Rule *per se* against the admission of documents from the internet, as was done by the defence itself during the testimony of witness TF1-334 (see exhibits D.19 – D.24).
[9] Transcript, page 14247, lines 12-22.
[10] Transcript, page 14248, lines 12-15.

apply and you cannot attempt to evade those provisions by simply dumping documents on witnesses who know nothing about them and trying to admit them through Rule 89(C)."[11]

9. Prosecution Counsel noted that Rule 92*bis* applies to documents offered *in lieu of oral testimony* and thus was not meant to apply to all forms of documentary evidence.[12] The Prosecution submitted as further evidence that Rule 92*bis* was never meant to apply to all documentary evidence the fact that by its terms the rule precludes the use of evidence that goes to the acts and conduct of the accused, often the most probative and relevant evidence to key issues in a case.[13] The Prosecution noted that in the ICTY and the ICTR, from where the SCSL rule originated, the use of the rule in practice was limited to the admission of witness statements, rather than documentary evidence. The Prosecution noted that the judges of the SCSL had modified the rule, and the *Fofana* Judicial Notice Decision explained that the intent of these amendments was to facilitate the efficient admission of documentary evidence, not to add technical hurdles.[14] The Prosecution concluded, "So our position is that 92*bis* was never meant to make it more difficult in the Special Court to get documents into evidence than they are in other tribunals, and it would not make sense to say it applies to every document because then it would preclude any document that goes to the acts and conduct of the accused from being admitted into evidence."[15] To this, Defence Counsel maintained "absent ... foundation ... Rule 89 does not allow for the admission of this document through this witness".[16]

10. Following the above submissions, the Trial Chamber issued the Decision:

> We have considered the submissions in this case. If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay foundation and in the instant case there is no sufficient foundation. If a document is to be

[11] Transcript, page 14249, lines 6-12.
[12] Transcript, page 14249, lines 26-27
[13] Rule 92bis(A)
[14] See *Prosecutor v. Norman et al.*, SCSL-04-14AR73, "Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005 ("***Fofana* Judicial Notice Decision**") the Appeals Chamber noted at paragraph 26: "The judges of this Court, at one of their first plenary meetings, recognised a need to amend ICTR Rule 92*bis* in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed and where a Truth and Reconciliation Commission and other authoritative bodies were generating testimony and other information about the recently concluded hostilities. The effect of the SCSL Rule is to permit the reception of "information" - assertions of fact (but not opinion) made in documents or electronic communications – if such facts are relevant and their reliability is "susceptible of confirmation" (footnotes omitted).
[15] Transcript, page 14251, lines 5-10.
[16] Transcript, page 14252, lines 26-28.

> tendered without a witness, then the application should be made under Rule 92*bis* of the Rules.[17]

III. APPLICABLE LAW

11. Rule 73(B) provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. As noted by this Chamber:

> "the overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals."[18]

However, as recognised by the Appeals Chamber, "the underlying rationale for permitting such appeals is *that certain matters cannot be cured or resolved by final appeal against judgement.*"[19]

12. The two limbs to Rule 73(B) – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for leave to appeal is to succeed. The jurisprudence of the Special Court establishes that an erroneous ruling does not *of itself* constitute exceptional circumstances.[20]

13. In relation to the first limb of the standard set out in Rule 73(B), what constitutes exceptional circumstances "must necessarily depend on, and vary with, the circumstances of each case."[21] However, as Trial Chamber I has observed "exceptional circumstances" may exist where a question of general legal principle is to be decided for the first time, where the cause of justice might be interfered with, or the question raises serious issues

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[17] Transcript, page 14253, lines 1-6. A copy of the ruling (being an extract from the Court Transcript) is provided in the **Annex**.

[18] *Prosecutor v. Brima et al*, SCSL-04-16-T-4-83, "Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98 of 31 March 2006", 4 May 2006, page 2.

[19] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005, para. 29 (emphasis added); see also *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005 ("***Sesay* Decision**"), para. 21.

[20] *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92*bis*", 17 July 2006.

[21] *Sesay* Decision, para. 25, which was noted in *Prosecutor v. Brima et al*, SCSL-04-16-T-588, "Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal", 23 November 2006, at page 3.

of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general.[22] This Trial Chamber has also considered whether an issue is likely to arise again as a relevant factor in determining whether to grant leave to appeal.[23]

IV. SUBMISSIONS

Error of Law

14. As a preliminary, it is necessary to identify the error of law in respect of which leave to appeal is sought, although it is appreciated that the fact that an error in law has occurred does not mean that leave to appeal must be granted.

15. The Decision involves two errors of law. First, the Decision is contrary to the practice of the SCSL as documents have, in the absence of a witness, been admitted under Rule 89(C)[24] alone, and to the jurisprudence of the Appeals Chamber which has confirmed that documents may be so tendered under Rule 89(C).[25] Parties have not previously been limited to Rule 92*bis* to tender documents without a witness. Secondly, by ruling that to tender a document under Rule 89(C) it must be done through a witness, having laid sufficient "foundation", adds conditions of admissibility to Rule 89(C) which are not expressly prescribed by the Rule. As for the requirement to lay a foundation, the Defence submissions[26] lead to the conclusion that "foundation" equates to information establishing the origin, authenticity and reliability of a document. However, it is well established at the SCSL that relevance is the only condition of admission of evidence

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[22] *Sesay* Decision, 28 April 2005, para 26.
[23] *Prosecutor v. Brima et al.*, SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality", 12 October 2005, page 3.
[24] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-620, "Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination", 2 August 2006.
[25] *Fofana* Bail Appeals Decision, para. 26. In this Appeals Chamber decision it was found that "the Judge erred in law in refusing to admit the [unsigned] statement" of an individual who could not attend court to give testimony under Rule 89(C) (see para. 45). Notwithstanding the fact that the statement was tendered *in lieu of the oral testimony* of the individual, the Appeals Chamber did not state that the statement should have been admitted Rule 92*bis* but instead stated that there was nothing in Rule 89(C) which precluded its admission as evidence as it was relevant to the question at issue.
[26] See paragraph 6 above, where questions, the purpose of which were to establish the origin, authenticity and reliability of the document, were identified by Defence Counsel as being ones which must be asked before a document could be considered for admission.

under Rule 89(C)[27] and that there is no requirement that the evidence be both relevant and probative.[28] Nor is there a requirement under Rule 89(C) that evidence tendered under that Rule must be tendered through a witness.

Exceptional Circumstances

Issue of fundamental legal importance

16. The addition of two conditions of admissibility to Rule 89(C) which are not expressly prescribed by the Rule raises an issue of fundamental legal importance. According to the Rules and the jurisprudence, evidence may be admitted under Rule 89(C) once it is shown to be relevant. There is no requirement that Rule 89(C) be used to tender documents through or in conjunction with a witness. Further, to the extent "foundation" equates to issues of reliability and authenticity[29] requiring such "foundation" to be established before a document can be tendered through a witness is also a condition not prescribed by Rule 89(C). As stated above, the Prosecution is cognizant that errors of law do not themselves constitute exceptional circumstances. However, when the error imputes conditions to the admission of evidence, which error will be repeated on each occasion that the Prosecution seeks to tender documents in court in conjunction with or through a witness, then this error gives rise to exceptional circumstances. This is particularly so if proof of reliability and authenticity, which has previously been rejected by the Appeals Chamber, is encapsulated within the condition of "foundation".[30]

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[27] The Appeals Chamber has confirmed that when dealing with the admission of evidence under Rule 89(C) issues regarding reliability and probativity are properly considered by the Trial Chamber at the end of the trial as "[e]vidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission." (see *Fofana* Bail Appeals Decision, para. 24).

[28] *Prosecutor v. Brima et al.*, SCSL-04-16-T, "Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95", 24 May 2005, para. 13.

[29] See footnote 26 above.

[30] It is instructive to consider the following extracts from the *Fofana* Bail Appeals Decision: (i) at para. 23 " ... Although the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means they must be available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix."; (ii) at para. 24 " ... There is no rule that requires, as a precondition of admissibility, that relevant statements or submissions must be signed. That may be good practice, but it is not a rule about admissibility of evidence. Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition of its admission."; and (iii) at para. 25 " ... The fact that both documents were relevant meant that they should both have been admitted, for what they were worth when their probative value could be assessed in the context of all the other evidential material."

Issue of general principle to be decided for the first time

17. The question whether documents tendered in the absence of a witness may only be so tendered under Rule 92*bis* and not under Rule 89(C) alone, even where the documentary evidence is not being admitted *in lieu of oral testimony*, is a question of general principle to be determined for the first time at the SCSL. As the Decision will have a significant impact on the Prosecution and its ability to have relevant evidence admitted, this question of general principle gives rise to exceptional circumstances.

18. It is acknowledged that Rule 92*bis* has been used at the SCSL to admit documentary evidence in the absence of a witness. However, Rule 89(C) has also been used for this purpose.[31] The relationship between Rule 89(C) and Rule 92*bis* and the interpretation to be given to the language contained in Rule 92*bis* - "in lieu of oral testimony" – in conjunction with the restrictive language which prohibits the admission of evidence going to proof of that acts and conduct of the accused has not been considered before at the SCSL. In view of the potential prejudice which the Prosecution considers it may suffer as a result of the Chamber's view of the relationship between these two Rules, an important issue of general principle requiring immediate consideration at the appellate level is raised.

Cause of justice might be interfered with

19. The Prosecution is required to present its case in the most efficient manner possible. This is one of the original purposes underlying rules such as Rules 92*bis*. If the Prosecution is to be required to tender documents under Rule 92*bis* where it does not wish to call a witness or is unable to do so,[32] then it will be prevented from seeking the admission of evidence going to the acts and conduct of the accused. The limiting language of Rule 92*bis* has been interpreted to include documents containing information which is proximate to the Accused, so the Prosecution will be denied the admission of such relevant documents as well.[33] This will interfere with the cause of justice as the Prosecution will potentially be prevented from using the Rules as they have been applied and interpreted at the SCSL to

[31] See *Prosecutor v. Sesay et al.*, SCSL-04-15-T-620, "Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination", 2 August 2006.
[32] For example, the author of a UN or other public source document may not be readily identifiable or may be too numerous to realistically call to testify live.
[33] *Prosecutor v. Taylor*, SCSL-03-01-T-556, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 15 July 2008, page 4.

lead evidence supporting the Prosecution's case that the Accused was on notice of the atrocities being perpetrated in Sierra Leone, an important element of proof. By seeking to maintain access to Rule 89(C) the Prosecution is not causing undue prejudice to the Accused as Rule 89(C) is subject to Rule 95 which provides that "[n]o evidence shall be admitted if its admission would bring the administration of justice into *serious* disrepute".[34]

Irreparable prejudice

20. Irreparable prejudice will occur if the Prosecution is precluded from using Rule 89(C) to tender relevant evidence in those cases where the evidence is not being tendered through a witness and where such evidence goes to proof of the acts and conduct of the Accused or is evidence which is considered sufficiently proximate to the Accused. Further, the Decision precludes the admission of a document under Rule 89(C) where: (i) there is no witness either available or readily identifiable to testify to a document (i.e. a UN Security Council resolution which is the product of the consensus of many States); or (ii) the foundational requirements equating to reliability and authenticity cannot be met in respect of any witness. In such instances, the Prosecution will be prevented from putting otherwise relevant evidence through or in conjunction with a witness.

V. CONCLUSION

21. The Prosecution has satisfied the threshold required by Rule 73(B) in order for leave to appeal to be granted in respect of the Decision. The Prosecution, therefore, requests that the Trial Chamber grant leave to appeal the Decision.

Filed in The Hague,
25 August 2008
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[34] Emphasis added.

LIST OF AUTHORITIES

SCSL Cases

***Prosecutor v. Taylor*, Case No. SCSL-03-01-T**

Prosecutor v. Taylor, SCSL-03-01-T-556, "Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence", 15 July 2008

Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 21 August 2008

***Prosecutor v Brima et al*, SCSL-04-16-T**

Prosecutor v. Brima et al., SCSL-04-16-T, "Decision on Joint Defence Motion to Exclude all Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95", 24 May 2005

Prosecutor v. Brima et al., SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality", 12 October 2005

Prosecutor v. Brima et al, SCSL-04-16-T-4-83, "Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal pursuant to Rule 98 of 31 March 2006", 4 May 2006

Prosecutor v. Brima et al, SCSL-04-16-T-588, "Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal", 23 November 2006

***Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T**

Prosecutor v. Norman et al., SCSL-04-14-T-319, "Decision on Prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005

Prosecutor v. Norman et al., SCSL-04-14AR73, "Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'", 16 May 2005

Prosecutor v. Norman et al., SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92*bis*", 17 July 2006

***Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T**

Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005

Prosecutor v. Sesay et al., SCSL-04-15-T-620, "Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination", 2 August 2006

ANNEX

COPY OF THE RULING APPEALED

PRESIDING JUDGE: We have considered the submissions in this case. If the Prosecution wishes to tender a document under Rule 89 (c) through a witness, they need to lay foundation and in the instant case there is no sufficient foundation. If a
12:51:50 document is to be tendered without a witness, then the application should be made under 92 bis of the rules.

MR KOUMJIAN:

Q. Mr Witness, in relation to diamonds, does white have any meaning? Can you explain what it means when you talk about white
12:52:23 in relation to diamonds?

A. The weight means when it has been weighed. When we weigh it on the scale, that is where we know if weight.

Q. Sorry, perhaps the interpreter didn't understand me. I am just talking about the colour. I'm sorry if I was not clear.
12:52:46 The colour white.

A. Okay.

Q. Does "white" mean anything to you?

A. The colour by which you mean white, as you are all English people, when we say something is white it means it is purely
12:53:05 white and it has no other colour mixed with it. It is purely white.

Q. Mr Witness, for the record we are not all English people. Thank you. Sir, you have talked about the Guinea operation. Can you tell us what year that occurred?

12:53:37 PRESIDING JUDGE: Mr Koumjian, the witness used the term "Guinea war". Now is Guinea war and Guinea operation --

MR KOUMJIAN: I apologise:

Q. Sir, you said something about Guinea. Were you ever in Guinea yourself?